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No. 87-517

# In the Supreme Court of the United States

OCTOBER TERM, 1987

CECIL COE AND PETER POE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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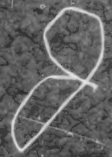

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Petitioners contend that a court order requiring them to consent to the disclosure of certain foreign bank records violates the Self-Incrimination and Due Process Clauses of the Fifth Amendment. They also contend that an order excluding evidence of the consent on the ground that it lacks probative value constitutes a grant of "constructive use immunity."

1. Petitioners are subjects of an investigation conducted by a federal grand jury sitting in the Southern District of New York. On May 28 and 29, 1987, the grand jury issued subpoenas duces tecum to petitioners requiring them to sign "consent directives" authorizing foreign financial institutions to disclose to the government certain documents relating to petitioners' accounts, if any such accounts exist. The directives provided that they should be "construed as consent" with respect "to any and all bank confidentiality laws of any state or nation." The directives also disclosed that they were executed " 'in compliance with the direction of a Grand Jury Subpoena Duces Tecum' " Pet. App. 2a-3a.

The district court denied motions to quash the subpoenas and ordered petitioners to appear before the grand jury to sign the directives. The court reasoned that petitioners could not invoke the Fifth Amendment privilege against compulsory self-incrimination because execution of the directives would not involve testimonial communications. The court modified some of the language of the directives, however, changing the title of the forms from "Consent Directive" to "Directive." The court also specified on the forms that the directives were being executed in compliance with a court order rather than a grand jury subpoena, and it provided that the directives could not be used as an admission against petitioners in any subsequent trial. Pet. App. 3a-4a.

Petitioners appeared before the grand jury and refused to sign the directives. Petitioners were then found in civil contempt, pursuant to 28 U.S.C. 1826(a), and were ordered incarcerated until such time as they execute the modified directives. The court of appeals stayed the order of confinement pending petitioners' appeal. Pet. App. 4a-5a.

The court of appeals subsequently affirmed (Pet. App. 1a-21a). The court rejected petitioners' claim that signing the directives would violate their Fifth Amendment privilege against compulsory self-incrimination. The court reasoned that compelled execution of the directives would not constitute "a *testimonial* communication that was incriminating" (*id.* at 8a (emphasis in original)). In this regard, the court observed that the directives at issue in this case do not name any specific bank or financial institution at which petitioners have accounts; they do not imply that any such accounts exist; and they do not imply that petitioners have possession or control over any such accounts (*id.* at 8a-9a).[1]

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[1] The court acknowledged (Pet. App. 10a) that the First Circuit had reached a contrary result in *In re Grand Jury Proceedings (Ranauro)*, 814 F.2d 791 (1987).

The court further explained that its conclusion that the Fifth Amendment did not apply to the execution of the directives did not turn on the fact that the district court had barred the admission of the directives into evidence at any subsequent trial. Because the directives contain no testimonial assertions that are incriminating, the court reasoned, the Fifth Amendment cannot provide a basis for excluding the directives at trial. The court of appeals therefore found that the district court's exclusion order could not be likened to a grant of de facto use immunity, which this court prohibited in *United States* v. *Doe*, 465 U.S. 605, 614 (1984). Pet. App. 11a. The court of appeals nonetheless upheld the exclusion order because it concluded that the compelled directives would lack probative value at trial (*id.* at 12a).

Finally, the court of appeals rejected petitioners' argument that unless they are permitted to note on the directives that they are signing under protest, they will be forced to sign false or misleading documents in violation of due process of law (Pet. App. 12a-13a). The court explained that the directives are not misleading because they state explicitly that petitioners are signing them pursuant to a court order. It therefore held that the directives "adequately reflect their coerced nature." *Id.* at 13a.[2]

2. Petitioners first contend (Pet. 8-19) that the court order requiring them to sign the directives authorizing disclosure of their bank records, if any such records exist, violates the Fifth Amendment. This issue is currently before the Court in *Doe* v. *United States*, cert. granted, No. 86-1753 (Oct. 5, 1987). The instant petition accord-

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[2] Judge Newman concurred, finding that Second Circuit precedent established "that a 'consent' for disclosure of records of any bank accounts a witness might have is not a testimonial communication, that it is consequently not protected by the self-incrimination privilege, and that a court order compelling the signing of such a 'consent' does not violate the Fifth Amendment" (Pet. App. 17a).

ingly should be held pending the outcome in *Doe* and then disposed of (with respect to the first question presented) as appropriate in light of that decision.

3. Neither of petitioners' other two claims warrants review by this Court. First, petitioners argue (Pet. 19-21) that the prospective exclusion of the executed directives from trial is, in fact, a grant of constructive use immunity that this Court disallowed in *United States* v. *Doe*, 465 U.S. at 616. This claim was correctly rejected by the court of appeals. The courts below did not bar use of the executed directives to protect petitioners' Fifth Amendment privilege; rather, the courts excluded the documents because they lack evidentiary significance. And an order excluding evidence on grounds of relevance is not a constructive grant of use immunity under *Doe*.

Petitioners also argue (Pet. 21-26) that their right to due process will be infringed if they are forced to sign a directive that is false and misleading. They argue that the directives at issue in this case are misleading because they do not inform a reader that they are the product of coercion. In fact, however, as the court of appeals explained, the directives inform the recipient financial institutions that petitioners signed pursuant to an order of the district court, and that the forms should be "construed" as consent. Thus, as written, the directives adequately apprise the reader that the consent was not voluntary on petitioners' part. No more is required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held pending the decision in *Doe* v. *United States*, No. 86-1753, and then disposed

of in light of that decision. In all other respects, the petition should be denied.

CHARLES FRIED
*Solicitor General*

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